

Note

The Exercise of Supervisory Powers to Dismiss a Grand Jury Indictment—A Basis for Curbing Prosecutorial Misconduct

I. INTRODUCTION

This Note discusses the circumstances under which prosecutorial misconduct warrants the dismissal of a grand jury indictment. In *United States v. Sears, Roebuck and Co.*,¹ the Ninth Circuit denied Sears' motion to dismiss an indictment even though the court found that the prosecutor had abused the grand jury process. The court stated that dismissal is justified only when a prosecutor's misconduct undermines the grand jury's ability to make an informed and objective decision.² Several other circuit courts hold this same view and assert that an indictment may be dismissed only when the prosecutor's misconduct infringes on the defendant's constitutional right to an impartial grand jury. Other circuit courts hold that a court may use its supervisory powers³ to dismiss an indictment in response to a prosecutor's misconduct even absent a showing of a biased grand jury. Those circuits which accept this latter theory contend that a court does not need constitutional authority to dismiss an indictment when dismissal is required to sustain the judicial integrity of the court and the grand jury process.

The goals of the grand jury and the nature of the prosecutor's role in the grand jury process support the contention that a court must have authority to exercise its supervisory powers to dismiss an indictment. A grand jury should control abuses by the government and protect the interests of the accused. A prosecutor should remain impartial during grand jury proceedings to insure that a just result is attained. The use of supervisory powers provides a remedy for the violation of an accused's recognized rights, deters future misconduct, and preserves and enhances the integrity of the judicial and the grand jury processes. Furthermore, a court's use of supervisory powers will not frustrate any public interests if an effective standard is adopted to govern the invocation of supervisory powers and if these powers are invoked sparingly. This Note advocates the use of supervisory powers to dismiss indictments in appropriate cases and prescribes an applicable standard under which these powers may be exercised.

II. THE HISTORY AND NATURE OF THE GRAND JURY

The grand jury was established in England in 1166 during the reign of Henry II.⁴ The purpose of the grand jury was to consolidate the royal power by enabling the

1. 719 F.2d 1386 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1441 (1984).

2. *Id.* at 1391. See also *infra* text accompanying notes 37-56.

3. Supervisory powers are a court's powers to supervise the administration of justice by establishing and maintaining standards of procedure and evidence. See *McNabb v. United States* 318 U.S. 332, 340 (1943).

4. M. FRANKEL & G. NAFTALIS, *THE GRAND JURY: AN INSTITUTION ON TRIAL* 6 (1975); D. NISSMAN & E. HAGEN, *THE PROSECUTION FUNCTION* 14 (1982); T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 112 (5th ed. 1956).

centralized government to have additional control over the administration of justice throughout the kingdom. Enhanced governmental control functioned to lessen the power of the Church and the feudal barons. The grand jury was not intended to protect citizens from arbitrary prosecution; instead, the grand jury was intended to be subservient to the King, to enforce his dealings with the state,⁵ and to encourage citizens to provide the government with information pertaining to crimes.⁶

In 1681, King Charles II sought to convict the Earl of Shaftesbury and Stephen Colledge for treason. Both men were determined Protestant opponents of the King's attempt to reestablish the Catholic Church in England. The grand jury rebuffed the King's efforts to influence the proceedings and eventually refused to issue an indictment. This assertion of power by the grand jury has been hailed as the initial manifestation of its "role as a shield for the innocent against malicious and oppressive prosecution."⁷ English settlers brought the grand jury concept to the New World and established the grand jury as an institution to (1) present malefactors for criminal prosecution and (2) protect citizens from arbitrary prosecution.⁸ The framers of the United States Constitution later incorporated the right to a grand jury in the fifth amendment⁹ for essentially the same reasons:¹⁰ "The Grand Jury is both a sword and shield of Justice—a sword because it is the terror of criminals, a shield because it is the protection of the innocent against unjust prosecution."¹¹

The grand jury process has an important role in the federal criminal justice system because a party cannot be charged with a felony unless a grand jury issues an indictment.¹² A grand jury proceeding is nonadversarial. The jurors do not determine a defendant's guilt or innocence; they merely determine whether a crime has occurred and whether an individual should be tried for that crime. The grand jury is an independent investigatory body that has been characterized by the United States Supreme Court as

a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.¹³

5. M. FRANKEL & G. NAFTALIS, *supra* note 4, at 7.

6. T. PLUCKNETT, *supra* note 4, at 112. Today, a determination of probable cause is based upon information presented by a prosecutor to the grand jury in a grand jury room. A grand jury acting on personal knowledge as a primary source of evidence would be an exceptional case. M. FRANKEL & G. NAFTALIS, *supra* note 4, at 6.

7. M. FRANKEL & G. NAFTALIS, *supra* note 4, at 9.

8. L. CLARK, *THE GRAND JURY* 13 (1975).

9. The fifth amendment provides in part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ." U.S. CONST. amend. V. During the American Revolution, the grand jury prevented the British from prosecuting many colonists who were opposed to British authority. The grand jury, therefore, became a highly respected institution. L. CLARK, *supra* note 8, at 16-17.

10. See *United States v. Calandra*, 414 U.S. 338, 342-43 (1973).

11. A.B.A., *FEDERAL GRAND JURY HANDBOOK* 8 (1959); see also *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

12. The grand jury exists in the federal criminal system and in more than one-half of the state criminal justice systems. The exact structure and format of the grand jury, however, varies from state to state. M. FRANKEL & G. NAFTALIS, *supra* note 4, at 19. The Supreme Court held in 1884 that the fifth amendment right to a grand jury does not apply to the states. *Hurtado v. California*, 110 U.S. 516 (1884). By 1884, however, some states already had elected not to require a grand jury in their criminal systems. See e.g., *State v. Keyes*, 8 Vt. 57 (1836).

13. *Blair v. United States*, 250 U.S. 273, 282 (1919).

The Supreme Court has asserted that the grand jury must be given broad investigatory power if it is to be an effective instrument of law enforcement.¹⁴ The Court has also noted that it is appropriate to vest broad investigatory power in the grand jury; the goals of a grand jury proceeding differ from the goals of a trial, and a defendant receives full procedural protection at a trial.¹⁵ Accordingly, many of the procedural and constitutional restraints embodied in a trial are not present in a grand jury proceeding.¹⁶

The grand jury has several objectives. It must strive to ensure individual liberties. In theory, the grand jury guards against malicious prosecution and protects defendants from the expense and humiliation of an unwarranted trial.¹⁷ At the same time, the grand jury is expected to prohibit the government from pursuing expensive and wasteful litigation.¹⁸ The grand jury must also permit citizens to participate in the maintenance of the law.¹⁹

III. THE ROLE OF THE PROSECUTOR IN GRAND JURY PROCEEDINGS

The Supreme Court has expressly defined the role of a prosecutor: A prosecutor is a "representative . . . of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."²⁰ A prosecutor is to prosecute, to the fullest extent possible and within the bounds provided by law, those who have committed crimes.²¹ Furthermore, a prosecutor is to aid, not direct, a grand jury in determining if there is probable cause for a trial.²² Undoubtedly, a prosecutor will make a personal determination about the guilt or innocence of a defendant; nevertheless, the rights of the defendant must be protected.²³

The prosecutor plays a major role in grand jury proceedings. The prosecutor requests that a grand jury be convened, obtains evidence, secures witnesses, conducts examinations, and instructs the grand jury on points of law.²⁴ The grand jury's productivity depends upon a prosecutor. Moreover, a prosecutor can greatly influence the grand jury because he or she controls the proceedings and the flow of information. This unbounded influence has led critics to characterize the grand jury

14. *Branzburg v. Hayes*, 408 U.S. 700, 701-02 (1972).

15. *United States v. Calandra*, 414 U.S. 338, 342-43 (1973).

16. *Id.* at 343; see *Costello v. United States*, 350 U.S. 359, 364 (1956) (The Court held that the validity of a grand jury indictment is not affected by inadequate or incompetent evidence.); see also *infra* text accompanying notes 71-75.

17. Note, *The Prosecutor's Unnecessary Use of Hearsay Evidence Before the Grand Jury*, 61 WASH. U.L.Q. 191, 197 (1983).

18. *Id.*

19. A.B.A., *FEDERAL GRAND JURY HANDBOOK* 10 (1959).

20. *Berger v. United States*, 295 U.S. 78, 88 (1935). One commentator argues that many prosecutors are insensitive to their duty to seek justice and have developed a "conviction psychology, viewing conviction not as the preferred result but as the only result." Lawless & North, *Prosecutorial Misconduct*, TRIAL, Oct. 1984, at 26, 27.

21. *Berger v. United States*, 295 U.S. 78, 88 (1935).

22. D. NISSMAN & E. HAGEN, *supra* note 4, at 2.

23. *Id.*

24. Comment, *Grand Jury Proceedings: The Prosecutor, the Trial Judge, and Undue Influence*, 39 U. CHI. L. REV. 761, 766-67 (1972).

as a "rubber stamp" of the prosecutor.²⁵ These critics fear that jurors passively accept whatever a prosecutor presents. The jurors are inexperienced in legal matters and therefore are inclined to rely improperly on the prosecutor.²⁶ Furthermore, many jurors believe that a defendant must be guilty because the prosecutor is attempting to obtain an indictment.²⁷

Proponents of the grand jury system emphasize that because a grand jury may request further evidence, call for the production of certain witnesses, question the witnesses directly, and request legal advice from a judge, the grand jury can curtail the power of the prosecutor.²⁸ Proponents also assert that because a prosecutor is barred from the room in which the jury deliberates, the jury is independent during the crucial phase of the hearings.²⁹ Critics of the system argue, however, that grand juries rarely consult outside counsel and rarely try to obtain additional evidence. In addition, the judge's restricted role in a grand jury proceeding limits a judge's ability to protect jurors from an overzealous prosecutor.³⁰ Moreover, defense attorneys are not in a position to check the power of prosecutors, since most jurisdictions exclude defense attorneys from grand jury proceedings.³¹

The jurors, however, can rely on evidence presented by a prosecutor and make an informed and objective decision if the prosecutor remains impartial. Theoretically, the impartial role of a prosecutor effects a just result. Impartiality, however, is not assured; when a prosecutor elects to present a case before the grand jury, the prosecutor probably will be committed to securing an indictment.³² Prosecutors are aware of the expense and time that a trial demands. They also realize that a grand jury indictment is of little value if the government's case cannot be proved in court.³³ Most prosecutors, therefore, will not seek an indictment unless they believe that a defendant is guilty and that the government has sufficient admissible evidence to obtain a conviction.³⁴

25. See D. NISSMAN & E. HAGEN, *supra* note 4, at 2. Several commentators have suggested that the role of the prosecutor in grand jury proceedings should be more restricted. In Florida, a special counsel, rather than a prosecutor, instructs the grand jury. In North Carolina and Connecticut, a prosecutor does not attend the grand jury proceedings at any stage. Arguably, even though a prosecutor may be absent from the proceedings, he or she still may influence the process by continuing to control the flow of information that is presented to the grand jury. However, many commentators argue that for the grand jury to be effective, a prosecutor must be present to protect the state's interest and to properly advise the jury. J. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 144-45 (1980). Other commentators recommend that a prosecutor's control over grand jury proceedings can be minimized by permitting the defense counsel to attend the grand jury proceedings. M. FRANKEL & G. NAFTALIS, *supra* note 4, at 64.

26. Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A.J. 153, 154-55 (1965); see also L. CLARK, *supra* note 8, at 141.

a 27. Antell, *supra*, note 26, at 155.

28. Comment, *supra* note 24, at 767.

29. The jurors also are instructed to be independent: "Listen to the evidence and the opinions of your fellow-jurors, but don't be a rubber stamp." A.B.A., *FEDERAL GRAND JURY HANDBOOK* 18 (1959).

30. Comment, *supra* note 24, at 767. For a discussion of a judge's role in grand jury proceedings, see *id.* at 767-69.

31. M. FRANKEL & G. NAFTALIS, *supra* note 4, at 24.

32. The decision to pursue a particular indictment is likely to be reached after the prosecutor has considered a significant number of factors, including the efficiency of the judicial system, the legal sufficiency of the government's case, the cost of trial, the jurisdictional climate, the office procedure, and the political climate. For a discussion of the decision-making process in a prosecutor's office, see G. COLE, *POLITICS AND THE ADMINISTRATION OF JUSTICE* 143-49 (1973), and NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, *POLICY AND PROSECUTION* (1982).

33. Prosecutors are concerned about their conviction rate; however, obtaining an indictment with insufficient evidence will not improve a rate of conviction. M. FRANKEL & G. NAFTALIS, *supra* note 4, at 25.

34. See Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction without Adjudication*, 78 MICH. L. REV. 463, 503 n.206 (1980); see also *United States v. Calandra*, 414 U.S. 338, 351 (1973).

Despite these practical considerations, however, the charging decision may be tainted by prosecutorial misconduct. A prosecutor's decision to seek an indictment might be motivated by political aspirations or by a desire to harass a defendant rather than by an obligation to convict a wrongdoer. Furthermore, prosecutors may pursue an indictment when there is insufficient evidence of legal guilt in order to "induce defendants to incriminate themselves or others in return for a plea-bargain."³⁵ Although the reasons for prosecuting in these circumstances are improper, the commitment to obtain an indictment is undoubtedly just as strong as the commitment to obtain an indictment in other properly motivated cases.

Thus, the essential issue is raised: What steps are necessary to ensure that a prosecutor's presentation of evidence to the grand jury is free of the prosecutor's personal biases so that an informed and objective grand jury decision can be obtained? Procedural rules have been established to ensure the impartiality of a grand jury.³⁶ Adherence to those rules is the best assurance of impartiality. The existence and use of a court's supervisory powers will provide prosecutors with the incentive to abide by the procedural rules.

IV. CONSTITUTIONAL DUE PROCESS AND THE USE OF SUPERVISORY POWERS

The due process clause of the United States Constitution requires that an accused be indicted by an impartial grand jury.³⁷ Accordingly, if a court concludes that a prosecutor has engaged in misconduct, it must determine whether the misconduct

35. Arenella, *supra* note 34, at 502; *see also* M. FRANKEL & G. NAFTALIS, *supra* note 4, at 52-53.

36. Prosecutorial misconduct may include (1) Prejudicial statements made by the prosecutor, such as abusive language, improper accusations, and inflammatory remarks; *see* United States v. Serubo, 604 F.2d 807 (3d Cir. 1979); (2) Preindictment publicity that is substantially generated by the prosecutor; *see* Beck v. Washington, 369 U.S. 541 (1962); United States v. Mandel, 415 F. Supp. 1033, 1061-65 (D. Md. 1976); (3) Failure to present exculpatory evidence; *see* United States v. Gold, 470 F. Supp. 1336 (N.D. Ill. 1979); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(B) (1982). *But see* United States v. Adamo, 742 F.2d 927 (6th Cir. 1984); United States v. Y. Hata & Co., 535 F.2d 508, 512 (9th Cir.), *cert. denied*, 429 U.S. 828 (1976) (The prosecutor has no duty to present exculpatory evidence to a grand jury.); (4) The use of hearsay evidence by the prosecutor in grand jury proceedings although reliance on hearsay evidence alone is not a valid cause for dismissal of a grand jury indictment; *see* Costello v. United States, 350 U.S. 359 (1956); United States v. Cruz, 478 F.2d 408 (5th Cir. 1973); United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972); (5) Use of the grand jury for political gain; *see* Bergman v. Lefkowitz, No. 77-3344 (S.D.N.Y. 1977), *aff'd*, 569 F.2d 705 (2d Cir. 1977); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-101 (1982); (6) Use of the grand jury for the purpose of obtaining evidence for another trial; *see* United States v. Doss, 545 F.2d 548, 552 (6th Cir. 1976); Beverly v. United States, 468 F.2d 732, 743 (5th Cir. 1972); (7) Use of a grand jury to prepare a civil case; *see* Ingram v. United States, 541 F.2d 166 (7th Cir. 1976), *cert. denied*, 430 U.S. 929 (1977); United States v. Procter & Gamble Co., 187 F. Supp. 55 (D.N.J. 1960); (8) Delaying the presentation of an indictment; *see* United States v. Marian, 404 U.S. 307 (1971); United States v. Mays, 549 F.2d 670 (9th Cir. 1977); (9) Premature signing of an indictment; *see* United States v. Singer, 660 F.2d 1295, 1302 (8th Cir. 1981), *cert. denied*, 454 U.S. 1156 (1982); (10) Improper use of subpoena power; *see* United States v. Sears, Roebuck & Co., 719 F.2d 1386, 1390 (9th Cir. 1983) *cert. denied*, 104 S. Ct. 1441 (1984); (11) Conflict of interest by the government attorney (the prosecutor must be a disinterested party); *see* United States v. Gold, 470 F. Supp. 1336 (N.D. Ill. 1979); (12) The prosecutor acting as a witness; *see* United States v. Birdman, 602 F.2d 547 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980); United States v. Gold, 470 F. Supp. 1336 (N.D. Ill. 1979); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B) (1982); (13) Violation of the grand jury secrecy rules; *see* FED. R. CIV. P. 6(e).

Whether these forms of prosecutorial misconduct warrant the dismissal of an indictment depends on the facts and the circumstances of each case. *See* Jeffress, *Dismissal of Indictments for Abuse of the Grand Jury Process*, 4 A.L.I. A.B.A. COURSE MAT. J. 57 (April 1980).

The actions of a trial judge may also lead to the dismissal of an indictment. *See* Blake v. State, 54 Okla. Crim. 62, 14 P.2d 240 (1932).

37. *Stirone v. United States*, 361 U.S. 212, 218-19 (1960); *see also* United States v. Cederquist, 641 F.2d 1347, 1353 (9th Cir. 1981).

undermined the grand jury's ability to make an informed and objective decision.³⁸ If the defendant demonstrates that he or she was prejudiced, then the indictment must be dismissed in order to protect the defendant's constitutional rights.³⁹ If the defendant fails to prove prejudice, then the Constitution does not require that the indictment be dismissed. Circuit courts, however, disagree on whether, in the absence of a biased grand jury, supervisory powers may be used to dismiss an indictment because of prosecutorial misconduct.⁴⁰

Recently, the Ninth Circuit, in *United States v. Sears, Roebuck and Co.*,⁴¹ discussed the differing views on the use of supervisory powers. In *Sears* the defendant Sears was accused of overstating the price it paid for television receivers purchased from Japanese manufacturers. Sears allegedly falsified the cost figures so that the recorded prices would meet the minimum price standard established by the Japanese Ministry of International Trade and Industry. Sears allegedly engaged in this practice to avoid dumping duties that are imposed in the United States for selling imported goods at less than fair market value.⁴² The grand jury issued an indictment. Sears alleged prosecutorial misconduct in the treatment of witnesses and the presentation of evidence and moved to dismiss the indictment. The district court found that the prosecutor was guilty of misconduct for the following five reasons: (1) the prosecutor failed to control the testimony of a particular witness, permitting the witness to make inflammatory and prejudicial statements; (2) the prosecutor expressed his personal views about the evidence; (3) the prosecutor abused the Sears' employees who had been called as witnesses; (4) the prosecutor failed to present exculpatory evidence necessary to allow the jury to make an informed decision; and (5) the prosecutor improperly issued subpoenas.⁴³

The district court held that the pervasiveness of the prosecutor's misconduct precluded the grand jury from making an impartial determination of probable cause. Therefore, the court dismissed the indictment.⁴⁴ The court emphasized that a prosecutor assumes a dominant role in grand jury proceedings, especially since defense attorneys are absent from grand jury hearings. Because a prosecutor possesses unbridled power, the court concluded that overzealous prosecution of a case should not be tolerated and asserted that for such extreme misconduct, the only remedy is to dismiss the indictment.⁴⁵

The Ninth Circuit agreed that the prosecutor had acted improperly. The court stated, "it is undeniable that the prosecutor abused his prerogatives in conducting this grand jury investigation—and we stress again that we are dismayed by the tactics he

38. In extreme cases of prosecutorial misconduct, a grand jury might be dismissed prior to handing down an indictment. See *United States v. Smyth*, 104 F. Supp. 283, 292 (N.D. Cal. 1952).

39. *U.S. v. McKenzie*, 678 F.2d 629, 631 (5th Cir.), cert. denied, 459 U.S. 1038 (1982); *United States v. Nemhard*, 676 F.2d 193, 200 (6th Cir. 1982); *United States v. Serubo*, 604 F.2d 807, 817 (3d Cir. 1979).

40. See *infra* text accompanying notes 95–136.

41. 719 F.2d 1386 (9th Cir. 1983), cert. denied, 104 S. Ct. 1441 (1984).

42. *Id.* at 1388.

43. *United States v. Sears, Roebuck & Co.*, 518 F. Supp. 179, 185–89 (C.D. Cal. 1981), rev'd 719 F.2d 1386 (9th Cir. 1983), cert. denied, 104 S. Ct. 1441 (1984).

44. *Id.* at 190.

45. *Id.* at 188–90.

employed.”⁴⁶ Although the court found that the prosecutor had abused the the grand jury process, it held that the indictment should not be dismissed; the misconduct had not infringed on the defendant’s constitutional right to be indicted only after an independent determination of probable cause made by a legally constituted grand jury. The court stated that dismissal is warranted “on constitutional grounds if prosecutorial misconduct has undermined the grand jury’s ability to make an informed and objective evaluation of the evidence presented to it.”⁴⁷ A court must focus only on “the impact of [the prosecutor’s] misconduct on the grand jury’s impartiality” and “not on the degree of culpability of the prosecutor.”⁴⁸ The court also held that the defendant must bear the burden of proof that the jury was unduly biased. Sears failed to demonstrate bias.⁴⁹ The court reasoned that even though the prosecutor’s misconduct prejudiced the jury, other actions of the prosecutor neutralized that effect and reinforced the independence and objectivity of the grand jury. The court also noted that the misconduct was comparatively insignificant in light of the length of the hearings and the tremendous amount of material that was presented to the jurors.⁵⁰

The Ninth Circuit refused to acknowledge that the use of supervisory powers could be the basis for dismissing an indictment. In its view, a court should rarely intervene because the constitutional separation of powers doctrine mandates that a court respect the independence of the grand jury system.⁵¹ The court argued further that since a grand jury proceeding is preliminary, and since a defendant is afforded constitutional protections at trial, there is less need to extend evidentiary and procedural restrictions to grand jury hearings.⁵² The *Sears* court concluded that only when the grand jury has not acted impartially should an indictment be dismissed, since it is only in this instance that the defendant’s constitutional rights are violated.⁵³

One circuit judge dissented in part, stating: “I would, unlike the majority, . . . leave open . . . the question whether the district court may exercise its discretion to dismiss the indictment on supervisory power grounds.”⁵⁴ The dissenting

46. *United States v. Sears, Roebuck & Co.*, 719 F.2d 1386, 1392 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1441 (1984).

47. *Id.* at 1391.

48. *Id.* at 1392.

49. *Id.*

50. *See id.* at 1392–94 for the court’s discussion of the appellant’s insufficiency of proof that the jury was biased by the prosecutor’s misconduct.

51. *Id.* at 1391 n.7; *see also* *United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977).

52. *United States v. Sears, Roebuck & Co.*, 719 F.2d 1386, 1391 n.7 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1441 (1984).

53. *Id.* at 1394. Whether the Ninth Circuit has denied lower courts the right to use supervisory powers to dismiss an indictment because of prosecutorial misconduct in all situations is unclear. In *United States v. Samango*, 607 F.2d 877 (9th Cir. 1979), the Ninth Circuit upheld the use of supervisory powers to dismiss an indictment for drug trafficking. In *Samango* the prosecutor committed several misdeeds including the deliberate introduction of perjured testimony to the grand jury. *Id.* at 881. The court stated “that the manner in which the prosecution obtained the indictment represented a serious threat to the integrity of the judicial process. The District Court’s dismissal, therefore, was a proper exercise of its supervisory power.” *Id.* at 885. However, the court also indicated that the prosecutor’s errors “operated to the defendant’s prejudice by producing a biased grand jury.” *Id.* at 884. This decision, therefore, may not be inconsistent with the holding in *Sears*.

54. *United States v. Sears, Roebuck & Co.*, 719 F.2d 1386, 1394 (9th Cir. 1983) (Norris, J., dissenting in part), *cert. denied*, 104 S. Ct. 1441 (1984).

judge asserted that dismissal based on constitutional grounds is analytically distinct from dismissal based on a court's supervisory power. The use of supervisory powers supports two institutional goals: deterring future prosecutorial misconduct and maintaining the integrity of the judicial process.⁵⁵ These goals are separate from the goal of protecting a defendant's constitutional right to a fair trial. The dissent concluded that the public has a primary interest in the sustenance of the judicial system's values. The benefit a defendant may receive from the dismissal of an indictment is incidental to this more significant public concern.⁵⁶ A court, therefore, should have the right, in the appropriate circumstances, to invoke its supervisory powers to dismiss an indictment when dismissal is necessary to maintain judicial integrity or to deter future prosecutorial misconduct.

V. THE VIEW OF THE SUPREME COURT

The Supreme Court has not directly considered the circumstances under which an indictment may be dismissed because of prosecutorial misconduct. Decisions in which the Court has addressed the propriety of indictment dismissal in general do not provide a clear indication of the present Court's view of the circumstances that justify dismissal of an indictment because of prosecutorial misconduct.

In *McNabb v. United States*⁵⁷ the Supreme Court asserted that a court's inherent role of supervising the judicial system "implies the duty of establishing and maintaining civilized standards of procedure and evidence."⁵⁸ The Court continually has recognized the necessity and the right of a court to use supervisory powers in certain instances. On several occasions, the exercise of supervisory powers has been approved in order to suppress evidence that the government obtained by improper actions.⁵⁹ The Court has expressed the belief that the use of supervisory powers in these instances would deter misconduct and protect the integrity of the judicial process.⁶⁰

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the

55. *Id.*; see also *United States v. Payner*, 447 U.S. 727, 736 n.8 (1980).

56. *United States v. Sears, Roebuck & Co.*, 719 F.2d 1386, 1395 (9th Cir. 1983) (Norris, J., dissenting in part), *cert. denied*, 104 S. Ct. 1441 (1984).

57. 318 U.S. 332, (1943).

58. *Id.* at 340.

59. See, e.g., *Elkins v. United States*, 364 U.S. 206 (1960); *Mallory v. United States*, 354 U.S. 449 (1957); *Mesarosh v. United States*, 352 U.S. 1 (1956); *McNabb v. United States*, 318 U.S. 32 (1943). The federal supervisory rule espoused by *McNabb* and *Mallory*, which provided for power to suppress confessions obtained in violation of Fed. R. CRIM. P. 5(a), has been superseded by 18 U.S.C. x3051 (1982), see *United States v. Manuel*, 706 F.2d 908, 912-13 (9th Cir. 1983).

60. See, e.g., *Elkins v. United States*, 364 U.S. 206, 217 (1960); *Mesarosh v. United States* 352 U.S. 1, 14 (1956); *McNabb v. United States*, 318 U.S. 332, 345 (1943).

end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernacious doctrine this Court should resolutely set its face.⁶¹

Although none of the cases in which the Court approved the use of supervisory powers concerned either prosecutorial misconduct or an appeal to dismiss an indictment, the policy considerations in those cases are still relevant. The policy concerns form a foundation upon which a court may exercise its supervisory powers to dismiss an indictment for prosecutorial misconduct.

A. Indictment Validity

The Supreme Court has been reluctant to sustain challenges to the validity of grand jury indictments. In *Costello v. United States*⁶² the Supreme Court stated that “[a]n indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.”⁶³ The *Costello* Court held that an indictment is not invalidated by the grand jury’s consideration of hearsay.⁶⁴ Justice Black, writing for the majority of the Court, justified the holding on three grounds. First, consistent with the broad investigatory powers of the grand jury, the panel should not be bound by evidentiary rules. Second, the judicial system would suffer burdensome delays if courts were forced to consider challenges which alleged that indictments were based on incompetent evidence. Finally, evidentiary challenges would “add nothing to the assurance of a fair trial.”⁶⁵

In *United States v. Morrison*⁶⁶ the Court refused to dismiss an indictment when the government interfered with the defendant’s sixth amendment right to counsel.⁶⁷ The defendant was indicted on federal drug charges and had been questioned, in the absence of her counsel, on two occasions by federal agents.⁶⁸ The Court held that because the defendant experienced no adverse consequences as a result of the government’s actions, the indictment could not be dismissed.⁶⁹ The Court based its decision on the strong public interest in prosecuting crimes.⁷⁰ This public interest is outweighed, and an indictment’s dismissal is warranted, only when the constitutional infringement of a defendant’s right to counsel has a prejudicial effect.

In *United States v. Calandra*⁷¹ the Supreme Court denied a fourth amendment

61. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting, *overruled by Katz v. United States*, 389 U.S. 347 (1967)).

62. 350 U.S. 359 (1956).

63. *Id.* at 363 (footnote omitted).

64. *Id.* at 359.

65. *Id.* at 362–64.

66. 449 U.S. 361 (1981).

67. *See* U.S. CONST., amend. VI.

68. *United States v. Morrison*, 449 U.S. 361, 362 (1981).

69. *Id.* at 367.

70. *Id.* at 364. The Court also stated that absent demonstrable prejudice, an indictment cannot be dismissed, even though the misconduct was deliberate. *Id.* at 365.

71. 414 U.S. 338 (1974).

challenge to the validity of an indictment. The Court held that evidence may be used in grand jury proceedings even if it was acquired in violation of the exclusionary rule.⁷² A witness who had appeared before the grand jury had refused to answer questions that were based on evidence obtained from an unlawful search and seizure.⁷³ The Court ruled that the use of the evidence was appropriate because the investigative role of the grand jury traditionally had been unimpeded by evidentiary restrictions.⁷⁴ The Court also stressed that grand jury proceedings do not require typical trial restraints since a defendant will have full constitutional protections at trial.⁷⁵

Costello, *Morrison*, and *Calandra* may indicate that the Supreme Court believes misconduct by a government official should not warrant the dismissal of an indictment, unless the misconduct has undermined the ability of a grand jury to make an objective decision. The policy justifications, however, for dismissing an indictment because of prosecutorial misconduct—to deter improper conduct and to protect the integrity of the courts—were not applicable in those cases. The Court in *Morrison* suggested that “a Sixth Amendment violation may . . . be remedied in other proceedings.”⁷⁶ The *Morrison* Court may have reasoned that the existence of alternative remedies for violations deters misconduct and protects judicial integrity. The Court ruled in *Costello* that the presentation of hearsay evidence to a grand jury does not constitute prosecutorial misconduct. Absent prosecutorial misconduct, the Court did not have to focus on whether dismissal of the indictment was required to maintain the integrity of the judicial system, or whether dismissal of the indictment was required to deter future misconduct. Additionally, in *Calandra*, the Court asserted that the exclusionary rule’s application to grand jury proceedings would not have a deterrent effect on improper police investigations.⁷⁷ Moreover, the improperly obtained evidence in *Calandra* and the hearsay evidence in *Costello* are types of information a grand jury normally should consider.⁷⁸ A grand jury “may consider incompetent evidence” because its investigatory function requires extensive investigation unimpeded by evidentiary restrictions.⁷⁹ Prosecutorial misconduct, however, has no value at all because it does not assist a grand jury in ascertaining the truth; in fact, prosecutorial misconduct is counterproductive since it often distorts the truth.

72. The exclusionary rule is derived from the fourth amendment of the Constitution.

73. *United States v. Calandra*, 414 U.S. 338, 339 (1974).

74. *Id.* at 349.

75. *Id.* at 343.

76. *United States v. Morrison*, 449 U.S. 361, 367 (1981).

77. *United States v. Calandra*, 414 U.S. 338, 351 (1974). The dissent, however, argued that applying the exclusionary rule to grand jury proceedings would have a deterrent effect on improper police investigations. *Id.* at 355–56 (Brennan, J., dissenting).

78. *Id.* at 344. In discussing *Costello* and *Calandra*, the Ninth Circuit, in *United States v. Zielezinski*, 740 F.2d 727 (9th Cir. 1984), asserted:

These cases suggest that challenges to indictments will not be heard where they rest on objection to the evidence-gathering process. They leave open the possibility, however, of hearing challenges to indictments where improprieties occurred within the grand jury process itself.

Id. at 732.

79. *United States v. Calandra*, 414 U.S. 338, 349 (1974).

B. Conviction Validity in Cases of Prosecutorial Misconduct

Recently, in *United States v. Hasting*,⁸⁰ the Supreme Court had an opportunity to address the circumstances under which a conviction may be overturned because of prosecutorial misconduct. In *Hasting* the defendants were convicted of kidnapping and transporting women across state lines for immoral purposes. The defendants appealed their convictions and alleged prosecutorial misconduct. The Seventh Circuit used its supervisory powers to reverse the convictions in order to discipline the prosecutor for improper conduct.⁸¹ The prosecutor violated the defendants' fifth amendment right to freedom from self-incrimination because during the trial, the prosecutor commented on the defendants' evidence and indicated that the defendants had never challenged the charges levied against them.⁸² The Seventh Circuit's decision was not based on jury bias. Instead, the Seventh Circuit reversed the conviction in an effort to punish the prosecutor for his improper behavior.

The Supreme Court, relying on the harmless error doctrine,⁸³ reversed the Seventh Circuit's decision.⁸⁴ The Court stated that a conviction does not have to be reversed if the prosecutorial misconduct was harmless, even if that misconduct involved an infringement of the defendants' constitutional rights.⁸⁵ The Court reasoned that participants in a trial are fallible and undoubtedly will commit errors. Therefore, convictions should not be dismissed readily. Furthermore, since several safeguards ensured a fair trial, the defendant's constitutional rights had not been violated. The Court, in addition, expressed the need to reinforce the public's interest in prosecuting crimes.⁸⁶

Hasting, however, holds only that a conviction resulting from prosecutorial misconduct will not be dismissed *per se*. *Hasting* does not establish an absolute rule against the exercise of supervisory powers in circumstances involving a harmless error.⁸⁷ The dissent explicitly stated that a court should not be precluded from using its supervisory powers simply because a prosecutor's error is harmless.⁸⁸ Furthermore, the reason the Court refused to allow the lower court to invoke its supervisory powers is apparent from the facts of *Hasting*. First, the jury's finding that the defendants were guilty beyond a reasonable doubt was supported by overwhelming evidence.⁸⁹ Second, the prosecutor's conduct was not clearly improper.⁹⁰ Third,

80. 103 S. Ct. 1974 (1983).

81. *United States v. Hastings*, 660 F.2d 301 (7th Cir. 1981), *rev'd*, 461 U.S. 499 (1983).

82. *Id.* at 303.

83. The harmless error doctrine mandates that if in a particular case a defendant's constitutional rights have been violated, the convictions will not be dismissed *per se* when the error is harmless beyond a reasonable doubt. *United States v. Hastings*, 103 S. Ct. 1974, 1980 (1983).

84. *Id.* at 1982.

85. *Id.* at 1980.

86. *Id.* at 1981.

87. *Id.* at 1988 (Brennan, J., concurring in part, dissenting in part).

88. *Id.* Justice Brennan states that "[c]onvictions are important, but they should not be protected at any cost." *Id.* at 1990.

89. *Id.* at 512.

90. *Id.* at 506 n.4; *see also id.* at 512-13 (Stevens, J., concurring).

because of the *Hasting* crimes' sensitive nature, the Court was concerned that the victims would experience severe trauma if forced to endure a new trial.⁹¹ Finally, because over four years had passed since the defendants had been charged with the crimes, many practical problems may have arisen if the case were retried.⁹² Therefore, in *Hasting* the interests that would have been served by allowing the court to invoke its supervisory powers were outweighed by the compelling facts of the case and by practical considerations. As stated by the *Hasting* majority opinion, "[G]uided by considerations of justice,' and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress."⁹³ Thus, the Supreme Court has not absolutely prohibited the use of supervisory powers to dismiss an indictment.⁹⁴

VI. LOWER FEDERAL COURTS' VIEWS ON THE USE OF SUPERVISORY POWERS TO DISMISS INDICTMENTS

Circuit courts diverge in their opinions on whether an indictment may be dismissed because of prosecutorial misconduct in the absence of an impartial grand jury. Several courts have ruled in accordance with the holding in *Sears*.

In *United States v. McKenzie*⁹⁵ a grand jury was asked to ascertain whether alleged police conduct in the investigation of a fatal shooting of a police officer violated federal law. The prosecutor in *McKenzie* expressed an opinion about the credibility of a witness and instructed the grand jury that an indictment should be issued. In fact, the prosecutor had signed the indictment form prior to the grand jury's deliberations.⁹⁶ The district court dismissed the indictment issued by the grand jury because of the prosecutor's misconduct.⁹⁷ The Fifth Circuit reinstated the indictment. The court felt that the grand jury had not been improperly influenced by the prosecutor's actions⁹⁸ and held that "an indictment may be dismissed *only* where the defendants' case has been unfairly prejudiced."⁹⁹ The Fifth Circuit rejected the argument that a court may invoke its supervisory powers to dismiss an indictment and stated that as long as a grand jury makes an independent determination, the integrity of the grand jury is upheld.¹⁰⁰

The District of Columbia Circuit Court of Appeals held in *United States v. Quiovers*¹⁰¹ that a loss of evidence, by itself, did not warrant the dismissal of an indictment for the unlawful distribution of narcotics.¹⁰² In *Quiovers* the Drug

91. *Id.* at 1979.

92. *Id.*

93. *Id.* at 1978 (quoting *McNabb v. United States*, 318 U.S. 332, 341 (1943)) (citation omitted).

94. See *United States v. Hogan*, 712 F.2d 757, 762 n.2 (2d Cir. 1983) (*United States v. Hastings* does not preclude the use of supervisory powers by a court to dismiss an indictment.).

95. 678 F.2d 629 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982).

96. *Id.* at 632.

97. *Id.* at 631.

98. *Id.* at 634.

99. *Id.* at 631 (emphasis added).

100. *Id.*; see also *United States v. Fulmer*, 722 F.2d 1192 (5th Cir. 1983).

101. 539 F.2d 744 (D.C. Cir. 1976).

102. *Id.* at 746.

Enforcement Agency failed to preserve a tape recording of a conversation between an undercover agent and the defendant. The court held that prejudice against the defendant must be demonstrated for dismissal of an indictment to be appropriate.¹⁰³ Although *Quivers* did not involve prosecutorial misconduct, it indicates the unwillingness of the court to allow the use of supervisory powers to dismiss an indictment in response to misconduct.

Other circuits have espoused the view that a court may use its supervisory powers to dismiss an indictment even in the absence of grand jury prejudice. In *United States v. Serubo*¹⁰⁴ the defendant was indicted for violations of internal revenue laws. The prosecutor in *Serubo* badgered uncooperative witnesses, commented on the veracity of witnesses, and attempted to link the defendant to organized crime.¹⁰⁵ The district court held that an indictment could not be dismissed unless the prosecutorial misconduct undermined the grand jury's ability to make an impartial decision.¹⁰⁶ While the prosecutor in *Serubo* was guilty of misconduct, the district court refused to dismiss the indictment. In the court's view, the grand jury's ability to make an impartial decision had not been affected.

The Third Circuit remanded *Serubo* and ruled that the district court had incorrectly interpreted the law.¹⁰⁷ The Third Circuit asserted that a court has "the authority . . . in the exercise of its supervisory power, to order the dismissal of the indictment as a remedy for prosecutorial misconduct before the grand jury," and that "[p]rejudice to the individual defendant has never been required in order to justify the exercise of the supervisory power."¹⁰⁸ The Third Circuit recognized that grand jury proceedings are secret and largely under the control of the prosecutor, and that, therefore, the grand jury system might be abused. The court concluded that the judiciary needs supervisory powers to aid in the regulation of grand jury proceedings. The court also stated that federal courts have an institutional interest that is independent of the defendant's rights—the need to maintain the appearance and the reality of fair proceedings.¹⁰⁹

In *United States v. Hogan*¹¹⁰ the Second Circuit dismissed the defendants' grand jury indictments for conspiracy to sell heroin. In *Hogan* the court felt that the prosecutor was "too determined to obtain an indictment."¹¹¹ The prosecutor had presented hearsay evidence to the grand jury, engaged in inflammatory rhetoric, and made speculative assertions about the defendant which proved to be false.¹¹² The court concluded that "the incidents [were] flagrant and unconscionable. Taking advantage of his special position of trust, the [prosecutor] impaired the grand jury's integrity as

103. *Id.*

104. 604 F.2d 807 (3d Cir. 1979).

105. *Id.* at 815.

106. *United States v. Serubo*, 460 F. Supp. 689 (E.D. Penn. 1978), *vacated*, 604 F.2d 807 (3d Cir. 1979).

107. *United States v. Serubo*, 604 F.2d 807, 816 (3d Cir. 1979).

108. *Id.* at 816-17.

109. *Id.* at 817.

110. 712 F.2d 757 (2d Cir. 1983).

111. *Id.* at 757.

112. *Id.* at 761-62.

an independent body.”¹¹³ The court asserted “that dismissal of an indictment is justified to achieve either of two objectives: to eliminate prejudice to a defendant; or, pursuant to [a court’s] supervisory power, to prevent prosecutorial impairment of the grand jury’s independent role. . . . [T]he latter function is implicated here.”¹¹⁴

In another Second Circuit decision, *United States v. Thibadeau*,¹¹⁵ the court refused to dismiss an indictment which alleged that the defendant had aided and abetted the submission of false loan documents.¹¹⁶ The defendant claimed that the prosecutor had harassed witnesses and had required the defendant to exercise his fifth amendment privilege against self-incrimination. The court held that no prosecutorial misconduct that would warrant the dismissal of an indictment had occurred: “[T]he government did not harass a witness . . . [or] ask appellant questions that it had reason to believe would cause him to invoke his fifth amendment privilege. . . . [I]f there was prejudice at all to appellant, it was not sufficient to warrant the extreme sanction of dismissing the indictment.”¹¹⁷ The court added, however, that “even though a jury unanimously found the defendant guilty beyond a reasonable doubt . . . [or] even though the defendant admitted his guilt . . . [the court may] nevertheless void his conviction because the prosecutor had made a misstep in obtaining a grand jury determination of probable cause.”¹¹⁸

The Tenth Circuit, in *United States v. Pino*,¹¹⁹ held that the prosecutor’s use of a suppressed statement to coerce testimony from a witness was improper. This misconduct, however, did not warrant the dismissal of the indictment because the error was harmless.¹²⁰ Other direct evidence provided a sufficient basis for the defendant’s involuntary manslaughter indictment. Although the circumstances in *Pino* did not “justify exercise of the court’s supervisory power to protect the integrity of the judicial process,” the Tenth Circuit endorsed the use of supervisory powers in appropriate cases, stating that an indictment may be dismissed because of a fifth amendment violation or because of a court’s exercise of supervisory powers.¹²¹

Some circuits have adopted restrictive standards governing when lower courts may properly exercise supervisory powers to dismiss an indictment because of prosecutorial misconduct. The Sixth Circuit, for instance, held in *United States v. Adamo*¹²² that the use of perjured testimony to secure an indictment did not warrant the dismissal of an indictment. The defendants, convicted on several counts of conspiracy to unlawfully distribute drugs, moved that the original indictment be set aside on the ground that a ledger book that was submitted to the grand jury contained false

113. *Id.* at 762.

114. *Id.* at 761. The court also stated that the “grand jury was probably misled by [the prosecutor’s] presentation.” *Id.* at 762.

115. 671 F.2d 75 (2d Cir. 1982).

116. *Id.* at 76.

117. *Id.* at 78.

118. *Id.* at 77–78.

119. 708 F.2d 523 (10th Cir. 1983).

120. *Id.* at 531.

121. *Id.*; cf. *United States v. Nunez*, 668 F.2d 1116, 1126 (10th Cir. 1982) (A defendant must affirmatively show that the grand jury was biased by the prosecutorial misconduct before an indictment can be dismissed.).

122. 742 F.2d 927 (6th Cir. 1984).

entries. The court, in refusing to overturn the indictment, emphasized that the prosecutor did not knowingly use perjured testimony and that the prosecutor was not obligated to return the case to the grand jury when there was no demonstrable proof that the grand jury was improperly biased.¹²³ The court added, however, that:

[O]ur approach does not render our Courts powerless against a prosecutor who abuses the office, for the power to exercise supervisory control over the prosecutor to protect the integrity of the judicial system remains. This power includes the authority to dismiss an indictment when appropriate. However, such supervisory power should be exercised . . . sparingly, "and only on a showing of demonstrated and longstanding prosecutorial misconduct."¹²⁴

In *United States v. Cady*¹²⁵ the defendant was convicted of mail fraud, but moved that the conviction be set aside because erroneous and prejudicial information was used to obtain the indictment.¹²⁶ The Eighth Circuit rejected the claim that the indictment should be dismissed, stating that there was no proof that the grand jury had been unable to make an objective decision as a result of the prosecutor's misconduct.¹²⁷ The court did acknowledge, however, that a prosecutor's willful deception may justify the invocation of a court's supervisory powers to dismiss an indictment. The Eighth Circuit concluded that "absent some evidence of gross purposeful deception by the prosecutor, an indictment legally valid on its face will not be overturned."¹²⁸

In *United States v. Udziela*¹²⁹ the defendant was indicted for conspiracy to illegally manufacture and distribute the drug PCP. The defendant moved to dismiss the indictment because it was based on perjured testimony presented by the prosecutor. The Seventh Circuit held that when a prosecutor presents perjured testimony to a grand jury, an indictment does not have to be dismissed if sufficient valid evidence to support the indictment is presented.¹³⁰ In *Udziela*, however, the court did not find that the prosecutor was guilty of misconduct, because the government was unaware of the perjured testimony at the time of the hearings. The court did suggest that "outrageous or intentional prosecutorial misconduct" might warrant the dismissal of an indictment.¹³¹

123. *Id.* at 940-41.

124. *Id.* at 942 (quoting *United States v. Nembhard*, 676 F.2d 193, 199 (6th Cir. 1982)).

125. 567 F.2d 771 (8th Cir. 1977), *cert. denied*, 435 U.S. 944 (1978).

126. *Id.* at 773.

127. *Id.* at 776.

128. *Id.* Later, in *United States v. Singer*, 660 F.2d 1295 (8th Cir. 1981), *cert. denied*, 454 U.S. 1156 (1982), the Eighth Circuit held that the submission of a presigned indictment to a grand jury did not warrant the dismissal of an indictment for conspiracy to sell stolen goods. The court stated that even though the conduct clearly was improper, the dismissal of the indictment would be warranted only if the grand jury was unduly influenced. *Id.* at 1302. In *Singer*, the court did not address the possibility of invoking its supervisory powers to dismiss the indictment.

129. 671 F.2d 995 (7th Cir.), *cert. denied*, 457 U.S. 1135 (1982).

130. *Id.* at 1001.

131. *Id.* The Seventh Circuit's current position on whether a court may use supervisory powers to dismiss an indictment because of prosecutorial misconduct is unclear. In *United States v. Stanford*, 589 F.2d 285 (7th Cir. 1978), *cert. denied*, 457 U.S. 1135 (1982), the defendants argued that pretrial publicity created by the prosecutor warranted the dismissal of an indictment for mail fraud. The defendants claimed the misconduct violated their right to an impartial grand jury and a fair trial. The Seventh Circuit refused to dismiss the indictment, holding that the defendants failed to demonstrate the grand jury was biased by the publicity. *Id.* at 298. The court maintained that the dismissal of an

The Eleventh Circuit has refrained from addressing the issue of when prosecutorial misconduct warrants the dismissal of an indictment. In *United States v. Pabian*¹³² the defendants moved to dismiss their indictments for mail fraud. They alleged that the prosecutor violated re-presentment procedures¹³³ and improperly prohibited one of the defendants from testifying.¹³⁴ The Eleventh Circuit held that prosecutorial misconduct had not occurred. The decision to resubmit a case to a grand jury is a matter of prosecutorial discretion, and, therefore, the prosecutor had not violated re-presentment procedures. Furthermore, the prosecutor's prohibition on the defendant's testimony was proper since a defendant has no constitutional right to appear before a grand jury.¹³⁵ The court acknowledged that it had not previously addressed the issue of when an indictment may be dismissed. The court also noted that other circuits were divided on the issue. The Eleventh Circuit, however, refused to take advantage of the opportunity offered by *Pabian* and stated that since no misconduct had occurred, the court would decide when prosecutorial misconduct warrants the dismissal of an indictment on another day.¹³⁶

VII. THE NECESSITY OF SUPERVISORY POWERS

Supervisory powers should be granted to courts so that they may dismiss grand jury indictments in cases of prosecutorial misconduct. The use of supervisory powers will further four essential public interests. First, it will enhance the protection of individual rights. Second, it will ensure the independence of the grand jury system. Third, it will deter future prosecutorial misconduct. Finally, it will preserve the integrity of the judicial system. To realize these interests courts must be free to exercise supervisory powers in appropriate situations, especially since the cautious use of these powers will not frustrate public policy.

Supervisory powers are necessary to protect a defendant's rights. Dominant goals of the grand jury system are to shield a defendant from unwarranted criminal charges and to guard against unfounded prosecutions.¹³⁷ Simply because a defendant is afforded constitutional protections of due process at trial does not justify intrusions on a defendant's rights during grand jury proceedings. An indictment can have devastating personal and professional consequences for a defendant. A later opportunity to contest and disprove the charges at trial often will not remedy the damage caused by the indictment.¹³⁸ Thus, a court should be able to exercise its supervisory

indictment in the absence of grand jury prejudice serves only to punish society for the prosecutor's misdeed. *Id.* at 299. There was no indication that the court would sanction the use of supervisory powers by the lower court to dismiss the indictment.

132. 704 F.2d 1533 (11th Cir. 1983).

133. See *infra* text accompanying note 170.

134. *United States v. Pabian*, 704 F.2d 1533, 1535 (11th Cir. 1983).

135. *Id.* at 1537-39.

136. *Id.* at 1540. The Eleventh Circuit has since intimated that under appropriate circumstances a court may invoke its supervisory powers to dismiss an indictment on the basis of prosecutorial misconduct. See *United States v. Hyder*, 732 F.2d 841, 845 (11th Cir. 1984).

137. See *supra* text accompanying notes 4-19.

138. *United States v. Serubo*, 604 F.2d 807, 817 (3d Cir. 1979).

powers to protect a defendant from suffering the effects of an improperly obtained indictment.

Courts also should be afforded the opportunity to use supervisory powers to dismiss indictments to ensure the independence of the grand jury system. It can be very difficult, if not impossible, to prove that a grand jury was unduly biased. A jury may have been biased in a particular case, but often the indictment will not be dismissed because the defendant cannot offer sufficient proof to demonstrate bias.¹³⁹ Because the defense attorney is barred from the proceedings and because grand jury proceedings are surrounded by secrecy, the defense attorney is often uninformed about the substance of the hearings.¹⁴⁰ Moreover, no one knows exactly how grand juries function and what actually influences their decisions. The testimony of jurors cannot be determinative on the question of whether they were improperly influenced. Few people will admit that they were biased.¹⁴¹ Additionally, some jurors may not realize that they were improperly influenced.

Several approaches have been suggested to solve the problem of proving grand jury bias. These alternatives allow more liberal standards for dismissal. One approach adopts a presumption that an indictment must be dismissed unless the prosecutor can prove that the grand jury was not biased improperly by the misconduct that occurred during the proceedings.¹⁴² Proponents of this view explain that the beneficiary of an error, the prosecutor who is guilty of misconduct, should be forced to establish that the error did not contribute to the indictment.¹⁴³ Unfortunately, this solution is inadequate; it merely shifts the problem—the difficulty of proving or disproving bias—to the prosecutor. In addition, proving that the grand jury was not biased would require much time and expense. The government's time and resources should not be devoted to a trial in which the government must prove lack of jury bias—especially since the difficulty of proof almost guarantees that the government will lose.¹⁴⁴ As a result, grand jury indictments might be dismissed too frequently. A better approach permits a court to consider using its supervisory powers to dismiss an indictment when a prejudicial effect of prosecutorial misconduct would be difficult to prove. This approach would prevent continual interference with the grand jury process as well as allow courts the flexibility to redress prosecutorial abuses.

Courts must be able to exercise their supervisory powers to ensure the grand jury's independence from the prosecutor. The use of these powers will allow courts to remedy egregious prosecutorial misconduct and to provide a check on the prosecu-

139. See Lawless & North, *supra* note 20, at 28.

140. For an outline of the steps that a defense attorney may take to prove that prosecutorial misconduct has biased a grand jury, see Lawless & North, *supra* note 20, at 28.

141. See Smith v. Phillips, 455 U.S. 209, 221–22 (1982) (O'Connor, J., concurring); United States v. Zielesinski, 740 F.2d 727, 732 (9th Cir. 1984).

142. Most courts adopt a presumption of *regularity* of the proceedings. See, e.g., United States v. Steel, 238 F. Supp. 580, 582 (S.D.N.Y. 1965). Most courts also place the burden of proof of jury bias on the defendant, and thereby require the defendant to show by a preponderance of the evidence that the grand jury was biased by the prosecutorial misconduct. See, e.g., United States v. Sears, Roebuck & Co., 719 F.2d 1386 (9th Cir. 1983) *cert. denied*, 104 S. Ct. 1441 (1984); United States v. McKenzie, 678 F.2d 629 (5th Cir. 1982).

143. See Chapman v. California, 386 U.S. 18, 24 (1967).

144. Arguably, since prosecutors control grand jury proceedings, they should be able to satisfy the burden of proof requirement if the grand jury in fact was not biased.

tor's control over grand jury proceedings. A prosecutor wields tremendous control over grand jury proceedings and commands considerable respect from the lay persons on a grand jury.¹⁴⁵ Therefore, a prosecutor who violates procedural rules has great potential to improperly prejudice a grand jury. Not only must prosecutors be encouraged to strictly adhere to procedural rules to minimize jury bias, a court also must exercise supervisory powers to check the improper influence of a prosecutor who has violated the established procedural norms in order to ensure that the grand jury remains independent of the prosecutor.

Considerations of public policy mandate the availability of supervisory powers to dismiss indictments absent a showing that prosecutorial misconduct interfered with the impartiality of the grand jury. Supervisory powers advance the goals of the grand jury; the existence and the use of supervisory powers deters prosecutorial misconduct and preserves judicial integrity.¹⁴⁶ A court should be free to dismiss an indictment in order to deter flagrant misconduct by the offending prosecutor and in order to deter future misconduct by other prosecutors. The use of supervisory powers warns prosecutors that courts will act if prosecutors behave improperly. This warning might prevent future misconduct that otherwise would require the dismissal of indictments. Thus, future trials to dismiss indictments could be avoided. The exercise of supervisory powers, therefore, should save the public from bearing unnecessary expense and delay.

Many courts are reluctant to concede that a grand jury has been biased by a prosecutor's misconduct.¹⁴⁷ These courts believe that because a defendant receives procedural protections at trial, the judiciary should not interfere with the broad investigatory powers of a grand jury or encroach on its independence. The courts' reluctance to interfere with grand jury proceedings has exacerbated the problems that *require* the use of supervisory powers.¹⁴⁸ The unwillingness of courts to find bias advances the likelihood that prosecutorial misconduct will occur since prosecutors are aware of the courts' reluctance to interfere with a grand jury. The availability of supervisory powers as an alternative ground for dismissal and the careful use of those powers will impress upon prosecutors the need to adhere to procedural rules, but still will permit courts to give deference to the grand jury institution.¹⁴⁹

Although in some cases a court may determine that a grand jury acted im-

145. *United States v. Serubo*, 604 F.2d 807, 816-17 (3d Cir. 1979); *United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974); *see also supra* text accompanying notes 24-36.

146. *United States v. Payner*, 447 U.S. 727, 735-36 n.8 (1980); *McNabb v. United States*, 318 U.S. 332, 345 (1943); *United States v. Serubo*, 604 F.2d 807, 816-17 (3d Cir. 1979).

147. Few reported circuit court decisions have held that the defendant sufficiently demonstrated bias. In *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974), the court reversed a conviction because the indictment had been issued as a result of hearings in which perjured testimony had been presented to the grand jury. The court held that a prosecutor must inform the grand jury of perjured testimony. One commentator explains this dearth of case law by asserting that because many judges were once prosecutors themselves, it is difficult to convince "a judge to consider seriously a motion suggesting prosecutorial misconduct." Lawless & North, *supra* note 20, at 28.

148. *Antell*, *supra* note 26, at 156.

149. One commentator noted that supervisory powers possess "a significant potential for reconciling the conflicting desires of the federal judiciary to improve standards for the protection of individual rights while exercising the self-restraint appropriate to constitutional adjudication and to the delicate balances of the federal system." Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656, 1666 (1963).

partially even though it was subjected to prosecutorial misconduct, the integrity of the judicial system may be threatened by the prosecutorial misconduct that occurred. Supervisory powers should be used to "guarantee that federal prosecutors act with due regard for the integrity of the administration of justice."¹⁵⁰ Moreover, the public's confidence in the judicial system is affected by the prosecutor's performance at the grand jury stage. Courts appear to condone improper acts when the prosecutor is allowed to prevail despite his or her misconduct. Rather, courts must "maintain respect for [the] law [and] . . . promote confidence in the administration of justice."¹⁵¹ The strong institutional interest in the maintenance of the appearance and reality of fair practice by a grand jury is essential and cannot be compromised.¹⁵²

Numerous policy justifications have been presented to support the position that an indictment should be dismissed only if prosecutorial misconduct has undermined the ability of a grand jury to make an informed and objective decision. These justifications, however, do not outweigh the interests that are served by allowing courts to exercise supervisory powers to dismiss indictments because of prosecutorial misconduct.

Arguably, a court's use of supervisory powers would be inconsistent with the nature of grand jury proceedings and with the role of the prosecutor in those proceedings. Grand jury proceedings give the jury broad investigatory powers, and, therefore, the typical trial restraints on the type of evidence which can be considered and on the scope of questions permitted are absent.¹⁵³ Broad investigatory powers are necessary since the grand jury's ultimate goal is to determine whether probable cause for trial exists. In the same respect, since a grand jury does not determine a defendant's guilt or innocence, misconduct by a prosecutor during a grand jury proceeding is not as menacing as if the misconduct occurred at trial. A trial provides safeguards to protect the rights of a defendant.¹⁵⁴

Likewise, the prosecutor's role is to prosecute those who have allegedly committed crimes. When a prosecutor's conduct does not bias a grand jury, the role of the prosecutor has not been improperly enlarged. The Constitution provides that an impartial grand jury must determine if probable cause for trial exists.¹⁵⁵ Provided that the grand jury was not biased by prosecutorial misconduct, the rights of the defendant have been upheld, and no justifiable interest is served by dismissing the indictment. If a grand jury has made an independent determination, the integrity of the judicial system also has been maintained.¹⁵⁶

150. *United States v. Basurto*, 497 F.2d 781, 793 (9th Cir. 1974) (Hufstедler, J., concurring); see also *United States v. Gonsalves*, 691 F.2d 1310, 1317 (9th Cir. 1982).

151. *Olmstead v. United States*, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting), *overruled by Katz v. United States*, 389 U.S. 347 (1967); see also *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974).

152. See *United States v. Serubo*, 604 F.2d 807, 816-17 (3d Cir. 1979).

153. See *United States v. Calandra*, 414 U.S. 338, 349 (1974).

154. See *United States v. McKenzie*, 678 F.2d 629, 631 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982). In *Costello v. United States*, 350 U.S. 359 (1956), for instance, Justice Black stressed in his majority opinion that upholding a challenge to an indictment on the ground that the indictment is not supported by competent evidence would "add nothing to the assurance of a fair trial." *Id.* at 364.

155. *Stirone v. United States*, 361 U.S. 212, 218-19 (1960); *United States v. Cederquist*, 641 F.2d 1347, 1353 (9th Cir. 1981).

156. *United States v. McKenzie*, 678 F.2d 629, 633 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982).

This analysis, however, is incomplete. It can be very difficult to demonstrate that a grand jury was biased by a prosecutor's misconduct. Moreover, this analysis provides no relief for the negative personal and professional consequences that a defendant will experience because he or she was improperly indicted. Nor does this analysis account for the fact that prosecutorial misconduct often distorts the truth thereby undermining the grand jury's ultimate goal of determining whether probable cause for trial exists. Finally, this analysis fails to account for the need to deter prosecutorial misconduct and the need to uphold the public's confidence in the administration of justice. Prosecutorial misconduct threatens the integrity of the judicial system, regardless whether the misconduct did not improperly influence the grand jury's determination.

Arguably, the independence of the grand jury system will be enhanced if courts are denied the use of supervisory powers to dismiss indictments. The Ninth Circuit, in *United States v. Chanen*,¹⁵⁷ stated that if courts were free to use their supervisory powers to dismiss indictments, the use of these powers would undermine the separation of powers between the judicial and the executive branches of government.¹⁵⁸ The court feared that the freedom to use supervisory powers would give judges too much control and influence over the role of prosecutors in grand jury proceedings. In addition, the trial judge who uses supervisory powers might usurp the role of the grand jury, since a court might misuse its supervisory powers when it decides whether a jury reasonably found probable cause in a particular case. A grand jury should not be influenced by the judicial branch of government.¹⁵⁹

These concerns and fears over the use of supervisory powers to dismiss indictments are shortsighted for three reasons. First, the grand jury must be independent of the prosecutor as well as of the court.¹⁶⁰ The most effective way to prevent potential abuse of the system and to ensure the independence of a grand jury is to require strict adherence to established procedural rules. The mere *existence* of a court's supervisory powers will encourage prosecutors to abide by these rules. Second, to require prosecutors, through the use of supervisory powers, to adhere to procedural rules is not an infringement of their independence since prosecutors are not free to violate established procedure. Third, the existence of supervisory powers will not infringe upon the independence of the grand jury or the independence of the prosecutor. The availability of supervisory powers does not require that they be exercised liberally. In fact, many courts that recognize the right to exercise supervisory powers have declined to uphold the exercise of this right.¹⁶¹ Courts must use self-restraint by not dismissing indictments indiscriminately. A court that exercises

157. 549 F.2d 1306 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977). The court in *Chanen* stressed, however, that "a clear basis in fact or law" would support a court's invocation of supervisory powers to dismiss an indictment. *Id.* at 1313.

158. *Id.* at 1312. *But see infra* note 160.

159. *United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977).

160. *Id.* Appellate courts often have confused the status of the grand jury by classifying it as an agency of the court or a prosecutorial arm of the executive branch. Under the constitutional scheme, however, the grand jury is not to be "captive to any of the three branches." *Id.*; *see also supra* text accompanying notes 20-23.

161. *See, e.g., United States v. Pino*, 708 F.2d 523 (10th Cir. 1983); *United States v. Thibadeau*, 671 F.2d 75 (2d Cir. 1982).

its supervisory powers also should be required to articulate clearly the basis for dismissal so that a reviewing court may control the potential abuse of supervisory powers. A clear standard which establishes when a court should invoke its supervisory powers to dismiss an indictment because of prosecutorial misconduct must be articulated. The use of self-restraint, the existence of higher court review, and a defined standard of application will ensure the independence of the grand jury and the prosecutor.

Practical considerations may weigh against a court's exercise of supervisory powers.¹⁶² Participants in a trial will inevitably make mistakes, and, arguably, an indictment should not be dismissed unless those mistakes affect the grand jury's objective determination. Otherwise, if every error justified indictment dismissal, grand jury proceedings would be sidetracked by insignificant technicalities.¹⁶³ Furthermore, liberally applied sanctions might lead to the demise of the grand jury system.¹⁶⁴

The discriminate use of supervisory powers, however, will allow a court, before it dismissed an indictment, to consider the expense and delay in the prosecution of crimes and the egregiousness of the prosecutor's error, since errors are inevitable in every proceeding. Moreover, the use of supervisory powers will strengthen rather than undermine the grand jury process. The grand jury institution has been the subject of severe scrutiny; many commentators believe that the grand jury process is inefficient and outdated.¹⁶⁵ Some commentators argue that the grand jury is ineffective because it is subject to the will and control of the prosecutor, and thus, the grand jury is the "rubber stamp" of the prosecutor.¹⁶⁶ Accordingly, these commentators suggest that the grand jury should be abolished. This "rubber stamp" criticism underscores the necessity for a court to be granted supervisory powers and the necessity for a court to exercise these powers to combat prosecutorial abuse. The use of supervisory powers would be an effective way to enhance the image of the grand jury as an independent and credible institution since a court would dismiss indictments which resulted from hearings involving prosecutorial misconduct.

Some people may argue that the use of supervisory powers to dismiss grand jury indictments violates public policy. The public has an important interest in the prosecution of crimes.¹⁶⁷ The judiciary also has an interest in bringing criminals to trial without expensive delays.¹⁶⁸ In addition, criminal defendants should not receive a benefit, the dismissal of charges against them, from prosecutors' mistakes unless the

162. See *United States v. Hasting*, 461 U.S. 499, 506 (1983).

163. *Costello v. United States*, 350 U.S. 359, 363 (1956).

164. Keeney & Walsh, *The American Bar Association's Grand Jury Principles: A Critique from a Federal Criminal Justice Perspective*, 14 IDAHO L. REV. 545, 564 (1978).

165. M. FRANKEL & G. NAFTALIS, *supra* note 4, at 117-38; Antell, *supra* note 26; Morse, *A Survey of the Grand Jury System*, 10 ORE. L. REV. 101 (1931); Whyte, *Is the Grand Jury Necessary?* 45 VA. L. REV. 461, 488-91 (1959); see also *Reform of the Grand Jury System: Hearings on S.3274 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 39-40 (1976) (prepared statement of Hon. John K. Van de Kamp).

166. Antell, *supra* note 26, at 154; Shannon, *The Grand Jury: True Tribunal of the People or Administrative Agency of the Prosecutor*, 2 N.M.L. REV. 141 (1972).

167. *United States v. McKenzie*, 678 F.2d 629, 631 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982); *United States v. Nembhard*, 676 F.2d 193, 200 (6th Cir. 1982).

168. *West v. United States*, 359 F.2d 50, 56 (8th Cir.), *cert. denied*, 385 U.S. 867 (1966).

defendants' rights have been adversely affected; otherwise society would be punished for the errors of a prosecutor.¹⁶⁹ However, the fear that guilty defendants will go free is unwarranted. Double jeopardy does not apply to the grand jury; thus a prosecutor may present the same case to a second grand jury if an indictment is not secured from the first panel of jurors.¹⁷⁰

The deterrence of prosecutorial misconduct and the preservation of the judiciary's integrity are separate and distinct goals from the protection of the defendant's right to an independent and impartial grand jury;¹⁷¹ "the individual defendant . . . serves only as a conduit for vindication of the public interest."¹⁷² These interests in deterrence and integrity are also to be distinguished from and given precedence over the interests in the mitigation of public expense and the ensurance that crimes are prosecuted. The public's vitally important interest in the fair and orderly administration of justice is primary.¹⁷³ A prosecutor must strictly observe the procedural rules of grand jury proceedings. In addition, a prosecutor must be subjected to disciplinary action for violations of those rules.¹⁷⁴ The public's interests are best served by granting supervisory powers to courts so that they may dismiss indictments when a prosecutor is guilty of misconduct which threatens judicial integrity or which must be censured to deter future misconduct.

VIII. A STANDARD OF APPLICATION

A workable standard that explicitly identifies the circumstances in which prosecutorial misconduct warrants the dismissal of a grand jury indictment must be developed. A workable standard will facilitate the effective use of supervisory powers. Courts which have held that supervisory powers may be exercised to dismiss an indictment because of prosecutorial misconduct often do not articulate satisfactorily the standard which should be applied to determine when dismissal is appropriate. Most courts agree that supervisory powers should not be applied indiscriminately,¹⁷⁵ but beyond this, courts neither consistently nor clearly define the standard that should be applied in deciding whether an indictment should be dismissed. Some courts have indicated that only willful or deliberate misconduct justifies the exercise of supervi-

169. *United States v. Stanford*, 589 F.2d 285, 299 (7th Cir. 1978), *cert. denied*, 440 U.S. 983 (1979).

170. M. FRANKEL & G. NAFTALIS, *supra* note 4, at 97. The decision to resubmit a case to a grand jury is a matter of prosecutorial discretion that generally is not subject to judicial scrutiny. *United States v. Batchelder*, 442 U.S. 114, 124 (1979).

171. *United States v. Scrubo*, 604 F.2d 807, 816-17 (3d Cir. 1979).

172. *United States v. Sears, Roebuck & Co.*, 719 F.2d 1386, 1395 (9th Cir. 1983) (Norris, J., dissenting in part), *cert. denied*, 104 S. Ct. 1441 (1984); *see also* *United States v. Hasting*, 461 U.S. 499, 527 (1983) (Brennan, J., concurring in part, dissenting in part).

173. *United States v. Hasting*, 461 U.S. 499, 527 (1983) (Brennan, J., concurring in part, dissenting in part).

174. Freedman, *Discipline An Errant Prosecutor*, N.Y. Times, Jan. 16, 1984, at A15, col. 2.

175. *See, e.g.*, *United States v. Fulmer*, 722 F.2d 1192, 1195 (5th Cir. 1983); *United States v. Sears, Roebuck & Co.*, 719 F.2d 1386 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1441 (1984); *United States v. Pino*, 708 F.2d 523, 530 (10th Cir. 1983); *United States v. Pabian*, 704 F.2d 1533, 1536 (11th Cir. 1983); *United States v. Ogden*, 703 F.2d 629, 636 (1st Cir. 1983); *United States v. Nembhard*, 676 F.2d 193, 199 (6th Cir. 1982); *United States v. Artuso*, 618 F.2d 192, 196-97 (2d Cir.), *cert. denied*, 449 U.S. 861 (1980).

sory powers to dismiss an indictment.¹⁷⁶ Other courts state that an indictment may be dismissed only on the basis of longstanding prosecutorial misconduct.¹⁷⁷

A court should have the ability to dismiss an indictment even though a defendant cannot prove that the prosecutor's misconduct biased the grand jury. A court's supervisory powers, however, should not be applied indiscriminately since an indiscriminate use of this power might undermine the grand jury's independence from the judiciary and might impose insignificant technical rules if every mistake were to warrant dismissal. Before a court dismisses an indictment on supervisory grounds, it should consider the following questions.

First, was the jury unduly influenced by the prosecutor's misconduct? A court should consider the type of misconduct, the amount and character of other evidence, and the defense counsel's ability to obtain evidence that indicates how the jury reached its decision.¹⁷⁸ As the certainty that a reasonable jury would have reached the same conclusions regardless of the prosecutor's misconduct decreases, the appropriateness for a court to invoke its supervisory powers to dismiss an indictment increases.

Second, will dismissing the indictment deter future misconduct by the offending prosecutor? A court should consider past violations by the prosecutor. It also should determine whether the mistake was a deliberate disregard for procedural rules, or whether the prosecutor simply was careless or negligent.¹⁷⁹ The more flagrant and deliberate the misconduct, the greater the need for dismissal of the indictment.¹⁸⁰

Third, will dismissing the indictment deter other prosecutors from acting improperly?¹⁸¹ Courts in a particular jurisdiction must address pervasive misconduct. Therefore, the more common and widespread or longstanding the misconduct, the greater the need to dismiss the indictment in order to deter prosecutorial misconduct.¹⁸²

Fourth, can misconduct be deterred in a less drastic way than dismissal of an indictment?¹⁸³ If a possibility for the imposition of professional disciplinary action or some other sanction exists, then the court may be less concerned with deterring the misconduct by dismissing the indictment.¹⁸⁴

176. See, e.g., *United States v. Cady*, 567 F.2d 771, 776 (8th Cir. 1977), *cert. denied*, 435 U.S. 944 (1978); *United States v. Quiovers*, 539 F.2d 744, 746 (D.C. Cir. 1976).

177. See, e.g., *United States v. Nembhard*, 676 F.2d 193, 199 (6th Cir. 1982); *United States v. Serubo*, 604 F.2d 807, 817 (3d Cir. 1979); *United States v. Fields*, 592 F.2d 638, 648 (2d Cir. 1978), *cert. denied*, 442 U.S. 917 (1979).

178. See *United States v. Serubo*, 604 F.2d 807, 818-19 (3d Cir. 1979).

179. Cf. *United States v. Cady*, 567 F.2d 771, 776 (8th Cir. 1977), *cert. denied*, 435 U.S. 944 (1978).

180. In *United States v. Bush*, 730 F.2d 129 (3d Cir. 1984), for instance, the court noted that "[i]f, following the grant of a suppression motion, a federal prosecutor were to present the same evidence to a grand jury, the application of . . . supervisory power[s] . . . might well be appropriate." *Id.* at 130.

181. See *United States v. Calandra*, 414 U.S. 338, 354 (1974).

182. See *United States v. Serubo*, 604 F.2d 807, 817 (3d Cir. 1979); *United States v. Houghton*, 554 F.2d 1219, 1224 (1st Cir.), *cert. denied*, 434 U.S. 851 (1977).

183. *United States v. McClintock*, 734 F.2d 438, 444 (9th Cir. 1984).

184. The Supreme Court held in *Imbler v. Pachtman*, 424 U.S. 409 (1976), that prosecuting attorneys are immune from tort liability under federal common law for actions taken in the scope of their duties. Courts, however, may sanction prosecutors by citing them for contempt of court. *United States v. Dozier*, 672 F.2d 531, 545 (5th Cir. 1982) (In absence

Finally, to what extent does a second presentation of the case before the grand jury burden the judicial system?¹⁸⁵ The length of the original hearings should be considered in order to determine whether the time and expense of calling a new grand jury outweigh the possible deterrence value of dismissing the indictment. The effect another hearing would have on the witnesses should also be determined.¹⁸⁶ The more traumatic the experience for the witnesses, the less desirable it is to require the witnesses to re-testify. Courts also should consider the practical problems of another hearing, such as the unavailability of witnesses or the loss of evidence. The indictment's effect on the defendant must also be assessed. The damage to the defendant's reputation which results from an unfair grand jury proceeding should outweigh any administrative concerns in most circumstances.

All of these factors should be considered together, and no one factor should be determinative. The interests involved must be balanced, and special attention must be given to the notion that supervisory powers are to be used sparingly. A court should state clearly the reasons which justify its election to exercise its supervisory powers. An explicit opinion will allow reviewing courts to determine whether the trial court abused judicial discretion and will warn prosecutors about the type of conduct which warrants dismissal.

IX. CONCLUSION

Supervisory powers should be granted to courts so they may dismiss grand jury indictments in cases of prosecutorial misconduct. The use of these powers will enhance the protection of individual rights, deter future prosecutorial misconduct, and preserve the integrity of the courts and the grand jury process. Moreover, the availability of supervisory powers will promote confidence in the administration of justice, yet will allow courts to exercise self-restraint in deference to the constitutional requirements of due process. In addition, the use of supervisory powers will not frustrate public interests as long as an appropriate standard to govern the exercise of the powers is adopted.

The grand jury was designed to control abuses by the government and to protect the interests of the accused. The conduct of the prosecutor must be restricted in a manner consistent with these goals. At a time when the grand jury process is being severely criticized, the image of the grand jury as an independent institution, free from the control of the prosecutor, should be reinforced.

In order to deal effectively with prosecutorial misconduct and to increase public confidence in the grand jury system, the grand jury process need not be altered. Rather, a prosecutor must be required to adhere strictly to existing procedural rules. Proper prosecutorial conduct will encourage community trust in the judicial system; improper prosecutorial conduct will create community distrust and violate public

of prejudice to a defendant, a contempt citation, a less drastic remedy than indictment dismissal, must serve to deter prosecutorial misconduct in grand jury proceedings.). Courts also may sanction prosecutors by identifying and chastising them in judicial opinions. *United States v. Hasting*, 461 U.S. 499, 506 n.5 (1983).

185. See *supra* note 170 and accompanying text.

186. *United States v. Hasting*, 461 U.S. 499, 507 (1983).

policy. The *existence* of supervisory powers will encourage prosecutors to adhere to procedural rules, and the *use* of supervisory powers will operate as an effective check on prosecutorial misconduct. Courts have a duty to maintain the integrity of the judicial system.¹⁸⁷ Therefore, in accordance with a clearly defined standard, a court should be permitted to invoke supervisory powers to dismiss an indictment when a prosecutor has engaged in misconduct, even though the misconduct does not prejudice the grand jury's decision to issue an indictment.

Douglas P. Currier

187. One commentator alleges that "[v]iolations of professional ethics by prosecutors are far too frequent," and that "little is ever done to punish an offending prosecutor." Freedman, *supra* note 174.

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